FILED
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JOHN F. DAVIS, CLER

NO. 283

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

APPENDIX C

ACCOMPANYING THE MOTION THAT THE REVIEW OF THE PETITION FOR WRIT OF CERTIORARI BE DELAYED

DONALD F. KNOX
Petitioner

vs.

THE STATE OF OHIO
Respondent

Donald F. Knox
127 W. Northwood Ave.
Columbus, Ohio

Petitioner

IN THE COURT OF APPEALS, FRANKLIN COUNTY, OHIO

In the Matter of the Appeal of Donald F. Knox : from a Decision of the : State Personnel Board of : Review

Case No. 8298

AFFIDAVIT

PRESENTED IN SUPPORT OF THE MOTION THAT THE DECISIONS OF THE LOWER COURTS BE REVIEWED

Donald F. Knox
127 W. Northwood Ave.
Columbus, Ohio

Appellant

William B. Saxbe
Attorney General
State of Ohio

Robert M. Zitko
Assistant Attorney General
State House Annex
Columbus, Ohio

Attorneys for Appellee

AFFIDAVIT

Now comes Donald F. Knox, the affiant herein and first being duly sworn and cautioned according to law states the following:

1. That on or about December 29, 1966, the affiant and his attorney, John A. Brown, 42 East Gay Street, Columbus, Ohio conferred by telephone regarding the recent hearing of affiant's appeal by the State Personnel Board of Review on December 1, 1964. Mr. Brown informed the affiant that the Office of the Attorney General had just raised the question as to whether the affiant would be willing to settle the dispute by negotiation and thus without a ruling by the Board. The affiant stated that he would consider the proposal and contact Mr. Brown within a few days. (Exhibit A).

2. That on or about December 30, 1964, Miss Theda Rippel, a clerk at the Information Desk at University Hospital, informed the affiant that her supervisor, Mrs. Leona S. Riedel, had informed her that the affiant would be returning to his former job and that Miss Rippel should attempt to recall derogatory information about affiant so that the University Hospital could fire him "legally" the next time.

3. That during the period from January 5, 1965 to January 11, 1965, the affiant conferred by phone and by letter with his attorney, Mr. Brown. Affiant states that he was confronted with the problem of needing the job while continuing his doctoral studies at Ohio State University since he had a large family and his wife's income was not sufficient. However, affiant feared that he would encounter harrassment by returning to that job, as was indicated in #2 above. Affiant also feared that his wife's position as evening nursing supervisor at University Hospital would be endangered if he should return to the job. Affiant's final decision as to the University's offer to negotiate was

made on January 11, 1965, at which time he instructed his attorney, Mr. Brown, to request a letter giving details of the termination and the right to return to the job in the future upon a vacancy occurring. Attorney Brown agreed to those terms. Affiant believed that such terms, if met, would protect him, in his effort to locate other campus employment, from a false charge by Mr. Harold Autrey, former Associate Administrator of University Hospital, that affiant had not given adequate attention to his duties as one of the chief night clerks. Affiant states that the actual reason for the termination was that he allowed about 115 employees to sign a paper registering their dissatisfaction with a certain change in policy.

4. That on or about January 14, 1965, Miss Theda Rippel, referred to in #2 above, informed the affiant that she had been told that the affiant would not be returning to his former position.

5. That on or about January 15, 1965, Attorney Brown sent a draft of a letter of recommendation to the University Hospital for consideration. Affiant states that he had no opportunity to review that draft.

6. That on or about January 27, 1965, Attorney Brown wrote to the affiant and informed him of the University's "final offer" and included a draft of a letter of recommendation which Mr. Harold Autrey had agreed to sign. Attorney Brown stated that affiant should accept the terms offered if he was at all interested in settling the matter by negotiation. Regarding those terms, the affiant states that Attorney Brown made no mention of affiant's request for the right to return to the job in the future upon a vacancy and that the proposed letter of recommendation in no way resembled a complete explanation of the termination as affiant had requested. The affiant states that he was quite disturbed by Attorney Brown's implication that the University would now be willing to have the Board rule whereas a month earlier the University was attempting to avoid such a ruling (Exhibit B).

7. That on or about January 28, 1965, the affiant phoned Attorney Brown and emphatically informed him that the affiant did not have to compromise on his terms since it was clear that the Board would rule in affiant's favor if a ruling became necessary. Attorney Brown accepted this interpretation without objection.

8. That on or about February 2, 1967, the affiant wrote to Attorney Brown and stated that he would be willing to discuss the matter of a more complete letter of recommendation with the Hospital Administration and that the back pay might cease as of January 31, 1965 if the offer to hold a discussion was accepted. The affiant also stated that the earlier request for the right to return to the job in the future should be dropped because affiant had been advised by another party that it was an unreasonable request, but affiant stated that the letter of recommendation would therefore have to be quite complete in terms of the details of the termination.

9. That on or about February 5, 1965 James R. Gould, then chairman of the State Personnel Board of Review, was appointed to the Ohio Board of Tax Appeals with the effective date of the appointment being February 9, 1965 and that Mr. Gould resigned from the Board effective February 8, 1965. The Affiant states that said information was obtained from Mrs. Hemrod of the Office of the Governor in a phone conversation. Furthermore, the affiant states that he had no knowledge of this change until about March 22, 1965.

10. That on or about February 12, 1965 Attorney Brown wrote to the Assistant Attorney General to inform him of the terms of affiant's latest offer (#8 above) and that the Board would be asked to render a decision if those terms were not met (Exhibit C).

11. That on or about February 11, 1965, Mr. Earl W. Allison, a member of the Board at the time of the hearing of affiant's appeal, was appointed chairman of said Board. This information was obtained from Mrs.

Hemrod (#9 above).

12. That during the period of February 12, 1965 to March 18, 1965, the affiant heard nothing from Attorney Brown regarding the proposal to the University as contained in the letter sent by Mr. Brown on February 12, 1965 (#10 above). Furthermore, affiant states that he had no knowledge during this period of there having been a change in the composition of the Board but had assumed that the Board which had heard his appeal and which had caused the University to ask for negotiations was still intact.

13. That on or about March 18, 1965 Attorney Brown phoned the affiant to inform him that the Attorney General had filed a motion to dismiss the affiant's appeal for reason that affiant had exercised an unreasonable length of time in bringing said appeal.

14. That on or about March 20, 1965 the affiant wrote to Attorney Brown and expressed great concern over the apparent willingness of the University to have the Board render a decision since the University had obviously tried to avoid such an action in offering to negotiate at an earlier date. Affiant states that he also reminded Attorney Brown of the comments made to Miss Rippel (#2 above) which indicated that the University had been informed that the Board planned to render a decision in favor of the affiant. Affiant states further that he requested Attorney Brown to supply the Board with information regarding the steps that affiant had taken from the time of job termination on May 14, 1964 until the appeal to the Board on October 9, 1964.

15. That on or about March 21, 1965 the affiant conferred with Attorney Brown by phone and was told by the latter that it would not be necessary to offer such information to the Board (#14 above) in view of the fact that the affiant had stated at the hearing that he had appealed as soon as he had learned of his right of appeal. The affiant agreed with Attorney Brown that this was theoretically

correct and did not press the matter further.

16. That on or about March 22, 1965 the affiant learned for the first time from another source other than Attorney Brown that Mr. Gould had departed from the Board (#9 above).

17. That on or about March 23, 1965 the affiant phoned Attorney Brown concerning the change in the Board's composition and was told that the change might work in favor of the employees.

18. That on or about April 11, 1965, following the Board's dismissal on April 9 of affiant's appeal, the affiant mailed to Mr. Allison, the new chairman of the Board, a summary of the steps that the affiant took from the time of job termination up till the appeal to the Board.

19. That on or about April 13, 1965 the affiant wrote to Attorney Brown and asked that he talk with Mr. Allison about the available evidence, which the affiant had just presented to Mr. Allison (#18 above), that refuted the charge of unreasonable delay and about the possibility of a rehearing.

20. That on or about April 15, 1965 Attorney Brown phoned Mr. Allison according to the affiant's request (#19 above).

21. That on or about April 21, Attorney Brown spoke in person with Mr. Allison, the chairman of the Board, concerning the affiant's request for a rehearing, but made no progress in the request.

22. That on or about April 27, Mr. Allison, Chairman of the Board, wrote to the affiant in reply to the summary sent to him of steps taken by the affiant prior to his appeal to the Board (#18 above). Mr. Allison rejected the request for rehearing and implied therein that the affiant had falsified a portion of the information that had been presented to Mr. Allison (Exhibit D).

23. That on or about June 13, 1965 Attorney Brown was dismissed from the case.

24. That on or about May 8, 1966, the day the Franklin County Court of Appeals dismissed the affiant's appeal,

the affiant visited Attorney Brown and was told that the latter regarded the decision of the Court of Appeals as being in error and that the precedent case, upon which the court had based its decision, was not an applicable one in affiant's case.

25. That on or about May 12, 1966 Attorney Brown and the Ohio Civil Service Employees Association, for whom Mr. Brown was counsel, agreed to appeal the adverse ruling in the affiant's case to the Supreme Court of Ohio because said decision had stated that an employee carried in the unclassified service did not have a right to bring the question of his unclassified status before the State Personnel Board of Review. Attorney Brown was to be paid by the OCSEA if the appeal was lost and by the affiant if the appeal was won.

26. That on or about May 25, 1965 the affiant informed Attorney Brown in a phone conversation that he wanted to take the case to the Supreme Court of the United States if it was lost in the Supreme Court of Ohio. Attorney Brown asked on what basis such an appeal might be made, to which the affiant reminded him of the various instances of denial of federal constitutional rights that had occurred at each preceding stage in the case.

27. That on or about June 2, 1966 the affiant wrote to Attorney Brown and raised a question concerning the possible relationship that the pending decision in the Supreme Court of Ohio in the case of State, ex rel. Bingham v. Riley, County Eng., 6Ohio St. 2d 263 might have to affiant's case. Affiant stated that he believed that if the Supreme Court of Ohio should sustain the appeal in the Bingham case, as had been presented by Attorney Brown, then that action would, in effect, overrule the decision of the Court of Appeals in the affiant's case. In reply, Attorney Brown stated that the affiant was in error in above stated theory because the appeal in the Bingham case stated that the decision of the Board was res judicata and thus did not touch upon the question as to whether or not the Board had a right to

hear an appeal from an unclassified employee (Exhibit E).

28. That on or about June 13, 1966 the affiant wrote to Attorney Brown and presented to him, among other matters, a comparison of State, ex rel. Baker v. Wichert, Mayor, 159 Ohio St. 50 (1953), on which the Court of Appeals had based its decision in the appellant's case, to other civil service cases and thus analyzed the inapplicability of the Baker case to appellant's case, Mr. Brown had stated earlier that the Baker case was not applicable to appellant's case (#24 above). (Exhibit F.)

29. That on or about November 25, 1965, still prior to the hearing before the Supreme Court of Ohio, the affiant had lunch with Attorney Brown and initiated a discussion concerning the possibility of going to the Supreme Court of the United States if necessary. Attorney Brown spoke of the costliness of such action. No final decision was made on the proposition.

30. That on or about December 1, 1966 the affiant phoned Attorney Brown and asked that he mention in the upcoming oral hearing before the Supreme Court of Ohio the significance of the decision in the case of State, ex rel. Brand v. Eversman, 155 Ohio St. 383 with respect to the dismissal of the affiant's appeal by the Court of Appeals. Affiant's point was that the fact that the court reviewed Brand's appeal was contrary to the decision of the Court of Appeals in the affiant's case. Affiant states that Attorney Brown agreed to mention the matter at the oral hearing since he considered it a good point.

31. That on or about December 8, 1966 at the hearing before the Supreme Court of Ohio, Attorney Brown made only a very slight reference to the decision in the Brand case (#30 above).

32. That on or about December 17, 1966, following the overruling of the affiant's motion to certify by the Supreme Court of Ohio, the affiant sent to Attorney Brown an outline of a proposed petition for certiorari to the Su-

preme Court of the United States and a proposed motion for rehearing to the Supreme Court of Ohio. Both outlines were based upon the denials of federal constitutional rights in the lower courts and upon the affiant's contention that the Supreme Court of Ohio, overruling his motion to certify, allowed the decision of the Court of Appeals in affiant's case to stand in contradiction to the decision of the Supreme Court of Ohio in the Bingham case (#27 above) (Exhibit G).

33. That on or about December 18, 1966 the affiant learned quite by accident that the Franklin County Court of Appeals had rendered a decision on December 13, 1966 in the Matter of the Appeal of John L. Crabtree et al. from a Decision of the State Personnel Board of Review, Case No. 8430-35, which was contrary to the decision of the same court in the affiant's case. Furthermore, the affiant states that he had to learn of said Crabtree case and the decision in said case quite by accident despite the fact that his attorney, Mr. Brown, had been the attorney for the appellants in the Crabtree case all along and despite the fact that said decision in the Crabtree case was of vital importance with regard to the affiant's case.

34. That during the period from December 18 to 27, 1966 the affiant proceeded to prepare a motion for rehearing based upon the contrary decisions in the Knox and Crabtree cases arising in the Court of Appeals. Furthermore, affiant states that he was attempting to meet with Attorney Brown at lunch in order to see if the latter would bring up the matter of the Crabtree decision and would file for rehearing based upon it.

35. That on or about December 27, 1966, which was the deadline for filing a motion for rehearing in the Supreme Court of Ohio in the affiant's case, the affiant and Attorney Brown met for lunch. The latter immediately made mention of the Crabtree case for the first time and the affiant informed him of his having read the decision.

Both parties immediately agreed that the latter was contrary to that by the same court in the affiant's case. Furthermore, the affiant proposed that a motion for rehearing be filed as a result of said contrary decisions and that it be stated that the affiant had been denied equal protection of the law. Attorney Brown expressed doubt about the effectiveness of said motion but received the draft that affiant had prepared and filed the motion for rehearing before the 5:00 p.m. deadline that day. This latter motion was overruled on Jaunary 11, 1967.

36. That on or about February 15, 1967 the affiant was finally able to meet Attorney Brown at lunch and discuss an appeal to the Supreme Court of the United States. The latter agreed to represent the affiant on a contingency basis without raising any objections. Furthermore, the affiant states that he again raised the question of the relationship of the decision of the Supreme Court of Ohio on June 15, 1966 in the Bingham case to the decision of the Court of Appeals in the affiant's case. When the question had been asked earlier (#27 above), Attorney Brown stated that there would be no relationship between the affiant's case and an opinion from the Supreme Court of Ohio in favor of the appellants in the Bingham case. Furthermore, the affiant states that, with regard to the decision favorable to the appellants in the Bingham case as rendered by the Supreme Court of Ohio on June 15, 1966, Attorney Brown at this luncheon meeting, finally agreed with the affiant that it could be argued that the latter decision did relate to the decision of the Court of Appeals in the affiant's case in that it affirmed the right of the Board to hear an appeal from an unclassified employee on the question of his unclassified status, which is exactly what had been denied by the Court of Appeals in the decision in the affiant's case.

37. That on or about March 25, 1967, the affiant wrote to Attorney Brown in order to inquire about the progress in preparing the appeal since the ninety day

deadline was April 11, 1967.

38. That on or about April 5, 1967, only a few days prior to the ninety day deadline for filing the petition, Mr. Brown wrote the affiant and informed him that he would not be able to proceed with the appeal to the Supreme Court of the United States due to pessimism regarding the possibility of success of said appeal and the pressure of other duties. Also, he did not inform the appellant of the right to request a sixty day extension. (Exhibit H)

Thus concludes the affiant.

_____
Donald F. Knox
Affiant

Sworn to before me and in my presence this_____day of September, 1967.

_____
M. B. Fox
Notary Public

My commission expires March 20, 1972.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "Affidavit" was mailed to Robert M. Zitko, Assistant Attorney General, State House Annex, Columbus, Ohio on the_____ day of September, 1967.

_____
Donald F. Knox
Appellant

I certify that a copy of the foregoing "Affidavit" was mailed to John A. Brown, Attorney at Law, 42 East Gay Street, Columbus, Ohio on the_____day of September, 1967.

_____
Donald F. Knox
Appellant